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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 408

ORZELL BILLINGSLEY, SR., C. HERBERT OLIVER, J. S. PHIFER AND ABRAHAM WOODS, JR., for themselves, jointly and severally, and for all others similarly situated,

Petitioners,

versus

GEORGE W. CLAYTON, as President of the Jury Board of Jefferson County, Alabama; MRS. FRED BATSON, as Vice President of the Jury Board of Jefferson County, Alabama; WALTER E. PALMER, as Associate Member of the Jury Board of Jefferson County, Alabama; JAMES F. CHEATWOOD, as Clerk of the Jury Board of Jefferson County, Alabama; and each of their successors in office,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

QUESTIONS PRESENTED

I.

WHETHER, WHERE PLAINTIFFS IN A CLASS ACTION ALLEGED THAT RESPONDENTS, IN MAKING UP JURY ROLLS AND JURY BOXES, SYSTEMATICALLY

EXCLUDED NEGROES THEREFROM, BUT FAILED TO PROVE THE NUMBER OF NEGROES ON SUCH ROLLS AND IN SUCH BOXES, THE BURDEN WAS CAST ON THE RESPONDENTS TO MAKE SUCH PROOF.

II.

WHETHER MERE PROOF THAT FEW NEGROES ACTUALLY *SERVED* ON GRAND AND PETIT JURIES MAKES OUT A PRIMA FACIE CASE THAT NEGROES WERE SYSTEMATICALLY EXCLUDED FROM THE JURY ROLLS AND JURY BOXES.

III.

WHETHER, WHERE THE NAMES OF PERSONS PLACED ON THE JURY ROLLS ARE OBTAINED BY A HOUSE-TO-HOUSE CANVASS SYSTEM, AND NO RECORD OF THE RACIAL IDENTITY OF SUCH PERSONS IS MADE, THE JURY BOARD MUST PROVE SUCH RACIAL IDENTITY IN ORDER TO REFUTE ALLEGATIONS OF RACIAL DISCRIMINATION AND SYSTEMATIC EXCLUSION.

STATEMENT OF THE CASE

Four Negro Plaintiffs filed a class action in the United States District Court for the Northern District of Alabama against the three Members and the Clerk of the Jury Board of Jefferson County, Alabama, "and each of their successors in office," seeking a temporary restraining order, or, in the alternative, a preliminary injunction to be later made permanent, or, in the alternative, a special three-judge court to hear the cause and declare the rights of the Plaintiffs and

others similarly situated pursuant to Title 28, U. S. C. A., Section 2281. The Plaintiff, C. Herbert Oliver, is a resident of that part of the County known as the "Bessemer Cut-Off" (R. 22). The other Plaintiffs reside in the Birmingham Division of the County (R. 22). The Plaintiff, Orzell Billingsley, Sr., had a civil action pending in the Circuit Court of Jefferson County, which was to be tried when reached in proper order.

The Plaintiffs prayed that the court enter a Judgment or Decree declaring that "the policy, custom, or usage of the Defendant Board in refusing to place all qualified Negroes on the jury rolls and in the jury boxes, solely on account of race or color, is unconstitutional and in violation of the Fourteenth and Fifth Amendments to the United States Constitution" (R. 11); and enjoining and restraining Defendant Board Members, their agents, employees, successors, "and persons in active concert and participation with them" from failing or refusing to place the names of all qualified persons on the jury rolls and in the jury boxes solely on account of their race or color" (R. 11), and from "utilizing any names presently contained in the jury boxes or on the jury rolls of Jefferson County, Alabama, for jury duty in any court in such county until such time as the names of all Negroes qualified for jury duty therein shall have been placed in such jury boxes or on such jury rolls" (R. 11-12).

The Plaintiffs based their claims to the relief prayed for on allegations that the method of selection of the names of Negroes to be placed on the jury rolls and in the jury boxes of Jefferson County, Alabama, by the Defendant Board Members "is highly illegal and arbitrary and contrary to the method prescribed by the Constitution and Laws of the State of Alabama and of the United States of America" (R. 8), thereby depriving them, and others similarly situated, of rights guaranteed them by the Constitution and Laws of the

State of Alabama and by the Constitution of the United States; that there exists a system or practice in the drawing or organization of juries to serve in the County deliberately designed to discriminate against Negroes [*this is not attributed to the Members of the Jury Board or to its Clerk*]; and that one of the Plaintiffs (Billingsley) then had a civil jury case pending on the docket in the Circuit Court of the County (R. 8-9).

The general provisions, with respect to juries and jury commissions of the several Counties of the State of Alabama are found in Title 30, Sections 1-100, Code of Alabama 1940 (Recompiled 1958). Except for certain general provisions, the matter is largely regulated in Jefferson County by Title 62, Sections 196-228, Code of Alabama 1940 (Recompiled 1958). In Jefferson County, the body charged with the selection of names to be placed on the jury rolls and in the jury boxes is called a "Jury Board," whereas, in other Counties it is called "Jury Commission." In Jefferson County, the law requires (Title 62, Section 199) the Board to obtain the names of male citizens between the ages of 21 and 65. In other areas of the State, a person over 65 is not required to serve on a jury (Title 30, Section 21), but is not mandatorily excluded. Under Title 62, Section 200, the Jury Board is deemed to have performed the duties required of it by law when it shall have prepared a jury roll otherwise in compliance with law consisting of at least 6% of the population of the County in accordance with the last Federal Census. The Complaint and Motion for Preliminary Injunction do not allege that this has not been done.

The Complaint merely alleges that the jury rolls of the County contain "less than 5% of the names of the total number of Negro males eligible for jury duty in said County" (R. 7).

When the roll is made up and the box is filled, the box is

then delivered into the custody of the Presiding Judge of the Circuit Court. Under the general provisions of the law, the box is kept in the office of the Probate Judge, and the President of the Jury Commission keeps one of the keys to the box (Title 30, Section 20). In Jefferson County, the Jury box is filled every two years, and the obtaining of information and the selection of prospective jurors for the rolls is a continuous process, with a continuing purging of the same. Approximately 35 categories of individuals are exempt from jury duty, based upon the nature of the employment of the individuals involved (Title 30, Section 3, and Title 35, Section 11). The qualifications of jurors are prescribed in Title 30, Section 21.

None of the Plaintiffs alleges that he, himself, possessed the qualifications of a juror or that his name had not been placed on the jury roll or in the jury box. In fact, the evidence showed that all four are ministers, who, in practice, would normally be excused, and one is a teacher, subject to exemption from jury duty under Title 30, Section 3. Only one, Billingsley, alleges that he had any direct interest in the composition of the jury roll and jury box, and that was in connection with a suit pending in the State Circuit Court.

By virtue of Title 62, Section 201, the Jury Board is charged with requiring the Clerk of the Board "to scan the registration list, the list returned to the Tax Assessor, any city directory, telephone directory, and any and every source of information from which he may obtain information, and visit every precinct at least once a year . . ." (R. 80-81).

The 1960 Census reveals that there were 634,864 people in the County.[1] The jury rolls contained the names of 52,729 males, 43,837 being in the Birmingham Division, and 8,892 in the Bessemer Cut-Off. Six percent of the total population

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[1]. 1960 United States Census, Alabama Table 7, pages 2-13.

of the County is 38,092. Thus, the jury rolls contain 14,637 names in excess of 6% of the total population.

There was no testimony or evidence as to the percentage of each race between the ages of 21 and 65 eligible for jury service. Furthermore, there was no testimony or evidence as to the percentage of each race claiming exemptions.

On May 16 and 17, 1962, extensive testimony was taken and evidence presented in support of the Motion for a Temporary Restraining Order, and on June 7, 1962, the Court declined to issue a Temporary Restraining Order (R. 22).

On November 2, 1964, further testimony was given and evidence presented, and on December 2, 1964, the Court made additional Findings, adopted the Opinion previously filed on the Motion for Temporary Restraining Order, and denied all relief (R. 34-37).

On December 17, 1965, this case was argued before the United States Court of Appeals for the Fifth Circuit *en banc* and on April 5, 1966, by unanimous opinion, that Court affirmed the judgment of the District Court, the opinion being reported in 359 F. 2d 13.

The principal evidence with regard to the operations of the Jury Board and its Clerk was given in the testimony of Mr. James F. Cheatwood, who had worked for the Jury Board for fourteen years, the last four of which were as Clerk (R. 82), and the testimony of Mr. Billy Ray Whitley, who had been employed by the Jury Board since 1960 and had served as Clerk since July 17, 1964. The testimony of Mr. Cheatwood appears in the Record at pages 81-94, pages 276-353, and at pages 435-444. The testimony of Mr. Whitley appears in the Record at pages 445-451.

Mr. Cheatwood testified that his duties required him to visit every precinct in the County, which he did (R. 82);

that he was able to get more information from those persons residing in the high economic sections, and that they were not as evasive as others (R. 84); that he had no idea of the racial percentages of the areas surveyed (R. 85); that the same procedures were followed in Negro neighborhoods as in White neighborhoods in making surveys for the Jury Board (R. 89); that the city directory was used only as a check on spellings and other possible questions (R. 92); that the principal method of survey was house-to-house (R. 92); supplemented by visiting store owners and Postmasters in outlying areas and writing letters (R. 92-93); that it was sometimes impossible to tell by the address on a list whether a person was Negro or White (R. 93-94); that his surveys were always on an impartial basis (R. 81-94); that a survey was made every two years all over the County in order to fill the jury box properly without regard to race, creed or color; that the Jury Board is the policymaking and reviewing group; that since he had been Clerk of the Jury Board, they had always used a house-to-house survey system to make up the jury list; that the policy had not been changed; that they did use a voter list, city directory, or tax register, because such lists would not show age or physical disability, nor would such lists show present residence addresses; that in making the survey, if no one is at home, the person making the survey leaves a card at the house; that the staff places information gathered in the survey on daily worksheets; that such information is then checked to determine whether a person has been convicted of a crime or is otherwise disqualified; that the worksheets do not show who is White or who is Negro; that the cards placed in the jury box contain no racial identification; that it takes approximately 13 to 14 months to make a survey; that when the survey is being conducted, nine extra workers are hired to work full time for nine months; that they tried to get a cross-section of the county according to the economic standing of the people; that

in some small communities he would go to the Postmaster and request him to furnish the names of qualified male citizens over 21, regardless of race, color or creed; that he sent out more than 80 letters to Negro professional people requesting them to furnish names of qualified persons; that he got only nine answers to these letters; that he had more difficulty in making surveys in Negro neighborhoods than in White neighborhoods; that frequently the Negroes would either not give information or would not come to the door; that many of them were very evasive or vague; that this was especially true in the low economic class (R. 305-306); that he had tried calling on some of the addresses of the letters he had written; that he had no idea of the percentage on the jury roll who might be Negroes; that he could not tell by looking at the jury roll whether a person was a Negro or a White person except in very isolated areas; that he had caused articles to be published in the newspapers regarding the compilation of the jury rolls; that letters had been sent to attorneys for the Plaintiffs (R. 320-322) (Defendant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 9A, 10, and 10A); that the response in the colored sections was less than 5%, whereas, the response from White sections was approximately 50% of the cards left; that sometimes he would have to walk as many as five or six blocks in alleys in colored sections to get the names of two or three men; that he has had thousands of White men come in the office and inquire about their names being in the box, but only two Negro men (R. 349); and that no distinction was made as to race in obtaining the names of prospective jurors to be placed on the jury roll and in the jury box (R. 276-353).

Mr. Billy Ray Whitley testified that he helped survey the Negro community and five temporary field agents surveyed integrated communities where Negroes and White persons were living in the same block; that in sparsely settled communities, the Clerk of the Board usually contacted store

owners and Postmasters to obtain names; that the Board still sent out letters seeking names; and that the policy had not changed (R. 367-385).

The 1960 Census reveals that there were 120,205 White males over 21 years of age and 51,961 non-white males over 21 years of age residing in Jefferson County; that between the ages of 21 and 65, there were 106,409 White males and 44,864 non-white males. Roughly, the ratio is 71% White and 29% non-white.

ARGUMENT

I.

WHERE PLAINTIFFS IN A CLASS ACTION ALLEGED THAT RESPONDENTS, IN MAKING UP JURY ROLLS AND JURY BOXES, SYSTEMATICALLY EXCLUDED NEGROES THEREFROM, BUT FAILED TO PROVE THE NUMBER OF NEGROES ON SUCH ROLLS AND IN SUCH BOXES, THE BURDEN WAS NOT CAST ON THE RESPONDENTS TO MAKE SUCH PROOF.

The Petitioners attempt to raise the question as to the burden of proof in systematic exclusion cases and seem to assume that the mere allegation of systematic exclusion of Negroes from the jury rolls and jury boxes and proof that a limited number of Negroes actually *served* on Grand and Petit Juries over a period of time in and of itself makes out a *prima facie* case of systematic exclusion of Negroes from the jury rolls and jury boxes and casts the burden on the Respondents to negative that fact.

It must be borne in mind that this suit was brought against the Members of the Jury Board and the Clerk of that

Board who are charged by law with certain functions in connection with the preparation of the jury rolls and jury boxes in Jefferson County, Alabama. It must also be borne in mind that the District Court, under general principles of law, was required to ascertain the facts as far as these particular Respondents were concerned and was limited in the relief which it could grant to the parties before the Court. The District Court could not, under any circumstances, hold these Respondents responsible for actions of persons acting independently of the Jury Board or of its Clerk.

Therefore, upon the examination of the Record, we are faced with the fact that the only thing that the District Court had to consider was whether or not the Members of the Jury Board and the Clerk thereof had been guilty of systematic exclusion of Negroes from the jury rolls and jury boxes of Jefferson County, Alabama.

An examination of the complaint and of the argument presented by Petitioners indicates that Petitioners feel that the law should be that each race should be proportionately represented on the jury rolls and in the jury boxes. As was well stated by Mr. Justice White in *Swain v. Alabama*, 380 U. S. 202, 13 L. Ed. 2d 759, 859 S. Ct. 824, 33 L. W. 4231:

> "Neither the jury roll nor the venire need by a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group."

The same idea was expressed in *Cassell v. Texas*, 339 U. S. 282, 286-287, 94 L. Ed. 839, 847, 70 S. Ct. 629, where the Court said:

> "Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation."

See, also, *Virginia v. Rives*, 100 U. S. 313, 322-323, 25 L. Ed. 667, 670-671; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. Ed. 1075, 16 S. Ct. 904; *Thomas v. Texas*, 212 U. S. 278, 282. 53 L. Ed. 512, 513, 29 S. Ct. 383; and *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276.

The mere fact of inequality in the number of persons of a racial group selected for jury duty does not in itself show discrimination; there must be a purpose to discriminate which may be proved by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination. *Fikes v. State*, 263 Ala. 89, 81 So. 2d 303, 309-311, reversed on other grounds, 352 U. S. 191, 1 L. Ed. 2d 246, 77 S. Ct. 281; *Akins v. Texas*, supra; *Cassell v. Texas*, supra; *United States ex rel. Willie Seals, Jr., v. Wiman*, 304 F. 2d 53.

There is no evidence that the Members of the Jury Board or the Clerk applied different standards or qualifications to the Negro community than they did to the White community, nor was there any meaningful attempt to demonstrate that the same proportion of Negroes qualified under the standards administered by the Jury Board. An imperfect system is not equivalent to purposeful discrimination based on race. The burden of proof was not carried by the Petitioners in this case. *Swain v. Alabama*, supra.

Petitioners ignore entirely the almost total failure of the Negro leaders in the County to assist the Jury Board in any way in securing the names of qualified Negroes to be placed on the jury roll. They attempt to place the blame for the disparity of the numbers of those actually *serving* on Grand and Petit Juries on persons not before the Court. They refuse to lay the blame where it rightly belongs—that is, on their own people. As was pointed out by Judge Grooms, District

Judge, in his additional Findings of Fact and Conclusions of Law on December 2, 1964:

"Once the jury box has been filled, possession is surrendered to the Probate Judge of the County. These Defendants have nothing whatever to do with the summoning of jurors for duty, drawing their names from the box, excusing them from service after they have been summoned, assigning them to numbered juries or selecting those who shall serve on the Grand Jury or on a trial jury. The number of peremptory challenges in both civil and criminal cases is fixed by statute. The exercise of such peremptory challenges rests exclusively with the parties.

"Any disparity between Negro and White jurors resulting from the summoning, drawing, excusing, assigning, or selecting of jurors cannot be attributed to these Defendants."

Under the laws governing the Jury Board of Jefferson County, Alabama, the Jury Board is deemed to have performed its duties when it shall have prepared a jury roll otherwise in compliance with law consisting of at least 6% of the population of the County in accordance with the last Federal Census. The Complaint and the Motion for Preliminary Injunction and Permanent Injunction do not allege that this has not been done.

The Complaint merely alleges that the jury rolls of the County contain "less than 5% of the names of the total number of Negro males eligible . . . for jury duty in said County."

The statute does not even require the jury roll to contain at least 6% of the eligible *male* population, regardless of race or color, but only 6% of the *total* population. Naturally, therefore, the jury roll conceivably contains less than 6%

of the eligible *White* males as well as less than 6% of the eligible *Negro* males, since the percentage is calculated on the *total* population, which includes women and children as well as persons over 65 years of age, those who have been convicted of crime and others ineligible to serve.

The suggestion that *Swain v. Alabama*, supra, raised or otherwise altered the standard or kind of proof necessary to make a prima facie case of the systematic exclusion of Negroes from Grand and Petit Jury service is untenable. *Swain v. Alabama* merely reasserted the well-known principle of law that allegata without probata does not make out a case justifying relief and that the burden of proof or disproof cannot be so easily switched merely because the complaints happen to be members of a certain race.

II.

MERE PROOF THAT FEW NEGROES ACTUALLY *SERVED* ON GRAND AND PETIT JURIES DOES NOT MAKE OUT A PRIMA FACIE CASE THAT NEGROES WERE SYSTEMATICALLY EXCLUDED FROM THE JURY ROLLS AND JURY BOXES.

What was said with respect to our argument in connection with the Proposition No. I, above, applies with equal force to this Proposition. However, we would like to further emphasize that whatever may be the situation as far as the actual *service* of Negroes on Grand and Petit Juries in Jefferson County, Alabama, has no relation whatsoever to the fact that the Members of the Jury Board and the Clerk of the Jury Board of Jefferson County, Alabama, have conscientiously performed their duties without any hint of possible discrimination on racial grounds. On the other hand, the

Record demonstrates without question that the system employed by the Jury Board of Jefferson County, Alabama, in making house-to-house surveys is probably the most commendable system of jury selection of any that has been before the courts including the key man system which was discussed in the cases of *Rabinowitz v. United States*, No 21256 and *Jackson v. United States*, No. 21345 (as yet unreported, which were decided in a consolidated opinion of the Fifth Judicial Circuit Court of Appeals on July 20, 1966). 35 L. W. 2061.

III.

WHERE THE NAMES OF PERSONS PLACED ON THE JURY ROLLS ARE OBTAINED BY A HOUSE-TO-HOUSE CANVASS SYSTEM, AND NO RECORD OF THE RACIAL IDENTITY OF SUCH PERSONS IS MADE, THE JURY BOARD IS NOT REQUIRED TO PROVE SUCH RACIAL IDENTITY IN ORDER TO REBUT ALLEGATIONS OF RACIAL DISCRIMINATION AND SYSTEMATIC EXCLUSION.

Purposeful discrimination may not be assumed or merely asserted. *Brownfield v. South Carolina*, 189 U. S. 426, 47 L. Ed. 882, 23 S. Ct. 510; *Tarrance v. Florida*, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402; *Smith v. Mississippi*, 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900; *Bush v. Kentucky*, 107 U. S. 110, 27 L. Ed. 354, 1 S. Ct. 625. It must be proven. *Tarrance v. Florida*, supra; *Martin v. Texas*, 200 U. S. 316, 50 L. Ed. 497, 26 S. Ct. 338.

Several years ago and in some recent cases the complaint was made that jury rolls and jury cards contained some means of racial identification, and on the basis of such complaints this Court held in the famous Scottsboro cases that to main-

tain such a system was unconstitutional. *Norris v. Alabama*, 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579; *Smith v. Texas*, 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164. Now, for some strange reason, attorneys in cases of this type are presently contending that the Jury Boards and Jury Commissions should maintain a record of racial identity of the persons considered as eligible for jury duty. Such an inconsistent position is not reasonable and should not be the subject of serious consideration by this or any other court, except that it apparently is being bruited about that the Negro race is at this time entitled to some favorable consideration or preferential treatment. This is not and should not and cannot be the *Law*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leslie Hall, one of the attorneys for Respondent, and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the 25th day of August, 1966, I served the requisite number of copies of the foregoing Brief in Opposition to Petition for Certiorari upon Charles Morgan, Jr., 5 Forsyth Street, N. W., Atlanta, Georgia 30303, Orzell Billingsley, Jr., Peter A. Hall, J. Mason Davis and Oscar W. Adams, 1630 4th Avenue, North, Birmingham, Alabama, Melvin L. Wulf, Jack Greenberg and Norman Amaker, 10 Columbus Circle, New York, New York 10019, attorneys for Petitioners, by depositing the same in the United States mail, first class postage prepaid and properly addressed to them at the addresses given.

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ASSISTANT ATTORNEY GENERAL
OF ALABAMA